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BY FAX
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Dear

Public Health and Municipal Services (Amendment) Bill 2008

We refer to your paper on Appeal and Compensation Mechanism (circulated to the Bills Committee vide LC Paper No. CB(2)1188/08-09(01) on 27 March 2009).

The doctrine of res judicata is a special form of estoppel. As between the parties to a judicial decision, they are bound by the decision, and may neither re-litigate the same cause of action nor re-open any issue which is an essential part of the decision. These two types of res judicata are nowadays distinguished by calling them "cause of action estoppel" and "issue estoppel" respectively : see *Crown Estate Comrs v Dorset CC* [1990] 1 All ER 19, 23.

We agree to the Administration's analysis that since the respective cause of action before the Municipal Services Appeals Board (MSAB), which seeks to overturn a section 78B order, and the cause of action before the District Court or Small Claims Tribunal, which seeks to claim compensation, is different, there is no cause of action estoppel.

However, as pointed out in paragraph 8(c) of the Administration's paper, there may be a common issue for both the MSAB and the District Court or Small Claims Tribunal to determine, i.e. whether the Authority had reasonable grounds to make a section 78B order. In such case, the issue estoppel comes into play. In this respect, the Administration points out in paragraph 7 of its paper that "[t]he

application of the said common law doctrines to litigation may be displaced by statute either expressly or by implication as a matter of construction of the relevant statutory provisions". It appears from the Administration's analysis in its paper that by construing the relevant provisions of the MSAB Ordinance (Cap. 220) and the relevant proposed new sections of the Public Health and Municipal Services Ordinance (Cap. 132), "[t]he MSAB's decision should not be treated as being conclusive on the issue for the purposes of the compensation proceedings". We appreciate the merits of the Administration's argument. However, you must be aware that any argument based on statutory construction may be subject to different judicial interpretation. To put the matter beyond doubt, would the Administration consider adding a provision to -

- (1) the proposed new section 78H to the effect that notwithstanding the MSAB's decision on the issue of the reasonableness of the Authority's decision on making a section 78B order, the District Court or Small Claims Tribunal may determine the same issue under subsection (1A)(a); and
- (2) the proposed new section 78G to the effect that notwithstanding the decision of the District Court or Small Claims Tribunal on the issue of the reasonableness of the Authority's decision on making a section 78B order, the MSAB may proceed to determine the same issue under the MSAB Ordinance?

By so doing, the application of the doctrine of res judicata is expressly displaced by statutory provisions.

We appreciate that your reply in both languages could reach us at your earliest opportunity.

Yours sincerely,

(Stephen LAM)
Assistant Legal Adviser

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